NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

No. CA08-1139

	Opinion Delivered April 29, 2009
GENE LUDWIG APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CV-2006-14827]
V.	
	APPELLEES' MOTION TO SUPPLEMENT THE RECORD AND FILE A SUPPLEMENTAL ABSTRACT
BELLA CASA, LLC, ET AL. APPELLEES	GRANTED

PER CURIAM

Appellant Gene Ludwig challenges the sufficiency of the evidence on appeal to support one of the jury's findings of fact, as well as the trial court's decision to grant an injunction on the basis of that finding. Appellees have filed a motion for leave to supplement the record and file a supplemental abstract. We grant appellees' motion.

An appellant who challenges the sufficiency of the evidence to support a finding or conclusion must include in the record a transcript of all relevant evidence. Ark. R. App. P. – Civ. 6(b). Appellant filed a notice of appeal designating specific points to be argued on appeal. None of these points contained a clear challenge to the sufficiency of the evidence. In his brief, however, appellant argues that the evidence was insufficient to support the trial court's findings on specific issues. We agree with appellees that these arguments were not designated with sufficient clarity to put appellees on notice that the additional parts of the

record now sought should have been designated by them pursuant to Ark. R. App. P. – Civ. 6(b). Furthermore, according to appellees, the abbreviated record did not include the testimony of most of the witnesses, including several appellees and their expert witnesses, and an expert called by appellant. Without the omitted testimony and any related exhibits, and in the absence of any knowing waiver or agreement between the parties to abbreviate the record in this manner, it is impossible for us to address all of the issues raised on appeal.

More fundamentally, appellant's abbreviated record is insufficient to show whether the order appealed from is final; as such, we are unable to determine if our jurisdiction is proper. The question of whether an order is final and subject to appeal is a jurisdictional question that this court will raise on its own. *Bevans v. Deutsche Bank National Trust Co.*, 373 Ark. 105, __ S.W.3d __ (2008). At the beginning of a pretrial hearing held on February 25, 2008, appellant orally moved to nonsuit his counterclaim for defamation, outrage, and declaratory judgment. The trial court granted that motion. However, the abbreviated record contains no Ark. R. Civ. P. 54(b) certificate. Absent such a certificate from the circuit court directing that the judgment is final, an order that fails to adjudicate all of the claims as to all of the parties is not final for purposes of appeal. Ark. R. Civ. P. 54(b)(2). In *Bevans*, the supreme court held that an order or judgment providing for the nonsuit of a compulsory counterclaim while entering a judgment on the plaintiff's claims is not a final, appealable order. It is therefore possible that the circuit court's order is not final and that we lack jurisdiction to hear this appeal.

Had a complete record been filed showing that appellant's counterclaim had been dismissed without prejudice, the absence of a Rule 54(b) certification would compel the conclusion that the order appealed from was not final, and we would dismiss the appeal. However, because the record in this case is abbreviated, we are precluded from doing so. Ark. R. App. P. – Civ. 6(c). Rule 6(c) mandates that we shall not affirm or dismiss a case based on an abbreviated record if the record was abbreviated in good faith either by agreement or without objection from the appellee. After appellant filed his notice of appeal, appellees filed a supplemental designation of the record, based upon appellant's designated points on appeal. After appellant's brief was filed and it became apparent that the sufficiency of the evidence was at issue, appellees filed the pending motion to supplement the record. While appellant's designation of points on appeal may have been sufficiently broad to encompass arguments relating to evidentiary insufficiency, we think that they were insufficiently specific to put appellees on notice that such arguments would be forthcoming.

Therefore, in light of Rule 6, we grant appellees' motion to supplement the record, at appellant's expense, within thirty days from this date. The supplemental record will include all of the testimony and exhibits introduced at trial, all claims for relief, and all orders disposing of any party to, or any claim presented in, the proceeding from which this appeal has been brought. We also direct that all claims for relief and all orders that dismiss any party or claim be included in the supplemental record, so that we can determine whether the judgment appealed from is final. *See Thomas v. Avant*, 369 Ark. 211, 252 S.W.3d 135 (2007). Appellant will then be required to file a substituted abstract, brief, and addendum that includes

the additional testimony, exhibits, pleadings, and orders. Appellant's substituted brief will be due fifteen days after the supplemental record is filed. Appellees' substituted brief will be due fifteen days after appellant's brief is filed. Appellant's reply brief, if any, will be due fifteen days after appellees file their brief. Appellant will bear the expense of appellees' costs and reasonable attorney's fees incurred in filing this motion; supplementing the record; and filing a substituted brief.

It is so ordered.

KINARD and MARSHALL, JJ., not participating